IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1943.

No. 28

THE BROTHERHOOD OF RAILROAD TRAINMEN, ENTERPRISE LODGE NO. 27, et al.,
Petitioners,

vs.

TOLEDO, PEORIA & WESTERN RAILROAD,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF OF PETITIONERS.

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LIST OF AUTHORITIES CITED.

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The questions presented for the consideration of this Court (Pet. p. 5) do not require a review of the evidence of alleged violence. These questions relate to (1) extension of the restraining order beyond five days, (2) federal jurisdiction of the subject matter, (3) and (4) proof of compliance with two provisions of the Norris-La Guardia Act. Respondent has, however, insisted on making an extended statement as to purported proof of violence and, in addition, attaching a diagram with "red dots" to

show such alleged violence. Lest this statement create an impression of magnitude and extensiveness as to these acts, we wish to point out to the Court that, with the exception of one exchange of blows between pickets and a strike-breaker following an automobile accident (R. 82) and an incident where a bottle of inflammable liquid was thrown upon an engine (R. 413), in which defendants insist no striking employee was involved, and several times when rocks were thrown at passing trains (R. 129), the proof of violence consisted almost entirely of testimony by railroad inspectors that at remote places in the company's line they found that glass had been broken in switch lights and that other minor damage had in some unexplained manner occurred to railroad property.

I.

At the request of this Court, communicated to us by the clerk, we discussed at length in our brief the question as to whether or not this case is moot. Respondent has not made any attempt in its brief to discuss this question. Yet it has seen fit to criticize us for referring to events occurring subsequent to the record in this case. According to the clerk's letter, this Court desired us "to discuss "whether there are any facts which have made the case moot." In view of this Court's request, we are at a loss to understand the attitude of respondent in criticizing us for discussing these facts and submit it is entirely unwarranted.

Complying with the Court's request, we have pointed out certain facts which we believe have continued this case as vital. We have shown that the District Court suspended enforcement of a contempt fine awaiting the decision of this Court on this appeal. We have shown that when the road is returned to private management, the same issues between the employer and the union will arise and the injunction will have application. We have shown

that the question of liability on the injunction bond alone is sufficient to prevent the case from becoming moot. This, in the absence of anything to the contrary by respondent, should be impressive on this question.

II.

A reading of section 7 (Sec. 107, Title 29, U. S. C. A.) of the Norris-La Guardia Act will demonstrate that there is no basis for respondent's contention that the 5-day limitation relates only to an extension made without notice. The act specifically states that this restraining order became "void at the expiration of said 5 days." It says nothing whatsoever about any extension either with or without notice. The District Court was not authorized to read an exception into the act contrary to its plain language.

III.

The argument of respondent on the question of the jurisdiction of the District Court goes so far afield from the issue involved, that we wish to again point out the real question. District courts, under the Judicial Code, have jurisdiction of cases where the matter in controversy "arises under the Constitution or laws of the United States" (Judicial Code, Section 24).

Cases do not arise under the laws of the United States unless the basic substantive right which a plaintiff claims has been violated or is about to be violated had its origin or creation in an Act of Congress. The right, which is the basis for the relief sought, must have been created by an Act of Congress, so that a court, in deciding whether the relief is authorized, must refer to the statute to determine just what rights Congress has conferred upon the plaintiff. The Court must then be able to construe the act with reference to the facts involved so that one construction will grant the relief asked and another construc-

tion will deny it. This Court has expressed this principle in many cases in language to the effect that the Act of Congress relied upon must be so fundamentally the basis of the lawsuit that its construction in one manner will allow recovery and in another way will defeat recovery.

Respondent, throughout its argument, has avoided a recognition of this proposition. It argues that this case involves the construction of its rights and duties under the Interstate Commerce Act, the Railway Labor Act and the Norris-La Guardia Act. But this misses the point. The railroad is seeking to enforce its fundamental substantive right to be free in its business from acts of violence. This respondent admits, but claims it is a federal right. At page 15 of its brief it states:

> "The right asserted by respondent to be free from violent interference of its business as an interstate carrier is created by the Federal Constitution and statutes and not by the state law . . ."

This is the only place where respondent really admits the true issue. Is the right of respondent to be free from violent interference of its business a right created by an Act of Congress, or is it one created by state law? Merely because plaintiffs' business happened to be interstate transportation does not change the situation in the absence of a federal statute creating the right. This was admitted by the Circuit Court of Appeals, which stated (R. 1024):

> "We well know that the mere fact that interstate commerce is involved and may be affected, is not sufficient to justify jurisdiction of a private suit seeking protection of such commerce."

The Circuit Court of Appeals then reached the result it did by reading into the Interstate Commerce Act that because a railroad had certain statutory duties with reference to providing transportation, there was by implication the right of the railroad to be free from interference by

any person while it was performing those duties. Congress did not see fit to enact such a provision in the act. Whether or not such a provision should be in the act is a matter for Congress alone.

Nor does the Railway Labor Act create any such right to be free from violent interference. It merely provides a machinery for the settlement of labor disputes and does not in any of its provisions deal with the subject of interference with the operation of railroads. Nor has respondent pointed out any such provision. Its argument relating to this act is that it contains a provision that arbitration is not compulsory and that, therefore, it has made every reasonable effort to settle the dispute as required by the Norris-La Guardia Act.

Consider this argument. We are attempting to determine a jurisdictional question, i. e., whether this case "arises" under a federal statute. Respondent does not point to a statute creating any substantive right, but points to another jurisdictional statute as being the statute upon which the case arises. The mere construction of a jurisdictional or procedural statute does not make a federal question. What must be involved is the construction of a statute creating a substantive right. This substantive right must be so fundamentally the basis of plaintiff's right to recovery that its construction one way as applied to the facts of the particular case will defeat the case and another way will allow recovery. It could be just as logically argued by respondent that this present jurisdictional point involves the construction of Section 24 of the Judicial Code, and, since a construction of this section in one manner will defeat him and in another will not, a federal question is involved. Similarly, it could be argued that when any other procedural or jurisdictional statute was seriously involved in a case, a federal question was involved. But this is contrary to the principle that a case "arises under the laws of the United States," only when

the right sought to be asserted as the substantive basis of the merits of the case, was created by an Act of Congress.

Respondent argues that it was held in Texas and N. D. R. Co. v. Brotherhood of Ry. & S. S. Clerks, 281 U. S. 548, 50 S. Ct. 427, and in Virginian Railway Co. v. System Federation No. 40, 300 U. S. 515, 57 S. Ct. 592, that federal courts have jurisdiction to entertain suits by the employee to enjoin the employer and therefore the employer should have a right here. Those cases were brought to force the employer to recognize a union as the employees' bargaining agent, as the Railway Labor Act specifically required it to do. No question of jurisdiction was involved or discussed.

Respondent states in its brief (p. 31): "A careful analysis of the issues in instant case will demonstrate that the fundamental principle in this case and in the Lennon case is exactly the same." As we have pointed out, this case (Ex Parte Lennon, 166 U. S. 548, 67 S. Ct. 658) was in its original form a suit by one railroad against other railroads to force the defendants to interchange freight. The Interstate Commerce Act specifically provided that the plaintiff had the express right to have freight interchanged, a thing which the defendants were refusing to do. This Court held that the case arose under a law of the United States, i. e., the statute which created the right of plaintiff to have its freight accepted. In the Lennon case the right asserted by plaintiff to have its freight interchanged was expressly created by the Interstate Commerce Act. But where is the federal statute that respondent says created its right "to be free from violent interference with its business"? None has been pointed out, and none can be pointed out. The right exists by virtue of the common law of the State of Illinois, and not by federal statutes. Consequently, the case does not "arise under the laws of the United States."

The case of Southern Pacific Co. v. Peterson, 43 F. (2d) 198, quoted from on page 30 of the brief, was a suit to enjoin the Attorney General of Arizona from enforcing the state train length limit law on the ground that it was unconstitutional. The question at issue here was not involved.

Respondent cites Sharp v. Barnhart, 117 F. (2d) 604, as being an answer to our argument that if the reasoning of the Circuit Court of Appeals is followed, motor common carriers which have the same duties with reference to furnishing transportation as railroads, will have the same implied federal right to be free from any act tending to obstruct or hamper them in such transportation, which right may be enforced in federal courts. In the case cited suit was brought to recover damages for the seizure of an interstate truck and its cargo. Certainly such act of seizure was an interference with interstate commerce. Yet the Court stated at page 606:

> "We are convinced that the District Court correctly dismissed the suits for want of jurisdiction."

This, we submit, is in accord with our position here. The present case, too, should have been dismissed for want of jurisdiction.

IV.

Respondent argues that, because the evidence showed numerous acts of violence had occurred, that this shows the public officers were unable or unwilling to protect their property. As we have pointed out, the "fifty separate instances" of alleged violence are largely made up of the sort of testimony by employees of respondent that they had found cracked glass in switch lights, etc., with no proof of how the condition occurred, and there were actually only several occasions when real violence occurred. Nor is this argument warranted in its conclusion that, be-

cause violence existed, the public officials have been unable or unwilling to protect plaintiff's property. The only persons who were asked to give any protection were the Sheriffs at Peoria and Tazewell Counties and the City Police of East Peoria. It is true plaintiff notified a number of other sheriffs, city police and mayors on January 2nd. This was only the day before the injunction complaint was filed. Without doubt it was an attempt to create the evidence required by the act and was too soon before the restraining order to be any evidence of the failure of these officials to furnish protection.

As we have pointed out in our brief, protection was furnished by those officials asked and arrests were made in all instances when requested

In our brief we pointed out that no complaint was made to the Governor and no request was made that the state militia furnish protection. This protection was available on the order of the Governor, but no request for it was made. Respondent attempts to reply by stating that the Governor is not a "public official," and cites Newton v. Laclede Steel Co., 80 Fed. (2d) 636, as so holding. That the Court did not even pass on this question is shown by its statement in the opinion at page 638:

> "No issue was made in the brief of lack of showing of the Governor's inability to protect Laclede's property."

The Governor, elected by the people, is certainly not a private official, but, rather, is a public official.

V.

Respondent now argues that it has complied with Section 8 of the Norris-La Guardia Act, in that it has actually made every reasonable effort to settle the dispute. This is contrary to the position taken by them in the District Court, where they contended that they had the one alter-

native under this section of complying with the obligations imposed by law or the other alternative of making every reasonable effort to settle such dispute. The "Findings of Fact" made by the Court merely found that the railroad had complied with the obligation imposed on it by law [Par. (d)] (R. 970). At no place did the District Court ever find that it had made every reasonable effort to settle the dispute. In fact, the District Court held otherwise in his oral opinion, stating, at record page 955:

> "Gentlemen, I think you men, as lawyers, know there isn't any way the Government of the United States could pass a law compelling arbitration in a case of this sort. I don't think that would be constitutional. It might be the proper thing to do to arbitrate this cause. As far as the Court is concerned and knows, it would be the proper thing to do, but I can't compel that sort of thing."

Thus, the record shows that the District Court found that the proper and reasonable thing for the railroad to have done to settle the dispute would have been to arbitrate it. The Circuit Court of Appeals, in its opinion, makes a statement somewhat to the contrary. But this it had no authority to do, since such findings in a District Court are not subject to revision at the instance of an appellee who has not prosecuted a cross appeal (Morley Construction Co. v. Maryland Co., 300 U. S. 185, 81 L. ed. 593, 57 S. Ct. 325). And the District Court could not have held otherwise with the evidence in this record showing that the railroad deliberately provoked this strike shortly after war began, in order to make the employees accept their terms or take the consequences of an aroused public feeling against strikes.

A good deal of respondent's argument is devoted to an attack upon the Mediation Board. It charges that it sent telegrams to the Mediation Board requesting the appointment of an emergency board, as provided by the Railway

Labor Act (Title 45, Sec. 160, U. S. C. A.), but the Board, although required by statute to do so, did not notify the President of this request. In defense of the Board, it may be stated that there is no evidence in this record that the Board did not notify the President. Witness Sprague testified (R. 786):

> "Well, the Mediation Board never committed itself to us on the matter of the appointment of an emergency board."

In any event, can it seriously be contended that this was a good-faith effort to settle this dispute? The railroad was adamantly insisting on its own rules and working conditions. The Brotherhoods were insistent that the old terms and conditions be continued. The railroad had refused to leave the matter up to arbitration as provided by the Railway Labor Act. It now makes some charge in its brief that the Mediation Board would not be fair and impartial in the conduct of the arbitration (p. 57). The Railway Labor Act provides for selection of one-third of the arbitrators by the carrier, one-third by the employees and the other third by majority vote of the arbitrators. In case they cannot agree on the selection, the Mediation Board selects the remainder.

How can they make such a charge when they do not know what arbitrators would constitute the board?

This method of settlement would have definitely and completely settled the question. The employees were willing to take their chances that the result might be against them, but the railroad did not have enough faith in its position to allow the arbitrators to weigh it against the employees' position. Their reason for refusing to do so is that they feared the arbitrators would not be fair with them. Were they also fearful that the federal courts, which could review the arbitration awards, as the act provides, would also be unfair?

As a substitute for this, they suggested an Emergency Board appointed by the President. But, could this board do anything to force the railroad from its position if it should be found unwarranted? Absolutely not. This board, under the statute, only had the power "to investigate and report respecting such dispute." We submit the railroad was not seriously attempting to settle this dispute when it refused to arbitrate and asked, instead, that an Emergency Board be appointed.

Respectfully submitted,

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